PRE-APPEAL BRIEF REQUEST FOR REVIEW	Docket Number (Optional) 59864.00246
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner of Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on _____ Signature _____ Typed or printed Name _____	Application Number: 10/027,577 Filed: December 20, 2001
	First Named Inventor: Ajay KAMALVANSHI, et al.
	Art Unit: 2113 Examiner: Puente, Emerson C.

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a Notice of Appeal.

The review is requested for the reason(s) stated on the attached sheet(s).
   Note: No more than five (5) pages may be provided.

I am the

☐ Applicant/Inventor.

☐ assignee of record of the entire interest.
   See 37 CFR 3.71. Statement under
   37 CFR 3.73(b) is enclosed

☒ Attorney or agent of record.
   Registration No. _____46,621_____

☐ Attorney or agent acting under 37 CFR 1.34.
   Reg. No. is acting under 37 CFR 1.34 _____

_____
Signature

_____Alicia M. Choi_____
Typed or printed name

_____703-720-7896_____
Telephone number

_____April 28, 2006_____
Date

NOTE: Signatures of all of the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☐ *Total of _____ forms are submitted.

April 28, 2006

In re the application of:

Ajay KAMALVANSHI, et al.   Art Unit: 2113

Application No.: 10/027,577   Examiner: Puente, Emerson C.

Filed: December 20, 2001   Attorney Dkt. No.: 59864.00246

For: METHOD AND APPARATUS FOR FAULT TOLERANT PERSISTENCY SERVICE ON NEWORK DEVICE

This is a Pre-Appeal Brief Request for Review from the final rejection set forth in an office action dated February 7, 2006, ("the office action") finally rejecting claims 1-21. It is respectfully submitted that the office action's contentions that U. S. Patent No. 5,615,364 to Marks ("Marks"), in view of U.S. Patent No. 5,649,089 to Kilner ("Kilner"), U.S. Patent No. 6,411,969 to Tam ("Tam"), and U.S. Patent No. 6,105,021 to Berstis ("Berstis") teach or suggest the recitations of claims 1-7, 9-15, and 17-21 are clearly erroneous. Applicants submit that clear error has been made and a *prima facie* case for obviousness has not been established, because the combination of references does not disclose all of the elements of the invention, and because teaching, motivation, or suggestion to combine the two references is necessary, but has not been established.

It is also respectfully submitted that the office action's contentions that Marks, Kilner, U.S. Patent No. 5,317,742 to Bapat ("Bapat"), and publication "Structure of Management Information Version 2(SMIv2)" by McCloghrie et al. ("McCloghrie") teach or suggest the recitations of claims 8 and 16 are clearly erroneous. Applicants submit that these rejections are clearly improper and without basis for at least the reasons discussed below.

Clear Error Regarding Interpreting Marks, Kilner, Tam, and Berstis

The office action's interpretation of Marks, Kilner, Tam, and Berstis providing the recitations of independent claims 1, 9, and 17 as set forth in the office action on pp. 2-5, is clearly erroneous. The detailed explanation of the error of this rejection, provided in the response filed on March 23, 2006, ("the response") at pp. 2-7 is incorporated herein by reference.

Marks generally describes primary and backup database operation. Upon changes to the

database, the primary and backup communication agents communicate with each other to automatically update the backup database. See column 3, lines 1-15. If malfunction occurs, the backup database takes over. See column 3, lines 15-20. Also, Marks describes that backup communications are synchronized to primary communications without any manual initialization or re-inputting of any data. See column 4, lines 59-63.

In turn, Kilner describes a redundant controller system having an active controller 112 with an active database and a standby controller 115 with a standby database. See column 2, lines 56-67. The system maintains a cumulative checksum of the entire database in a network controller 112 for substantially real time tracking changes to a database by providing a record checksum for a record and incorporating uniquely and reversibly the record checksum for the record into a cumulative checksum for the database. See column 3, lines 51-64.

Recognizing that Marks and Kilner are devoid of any teaching or suggestion providing, "a magic number is kept to distinguish any tar and zipped file with the standby database," as recited in independent claims 1, 9, and 17, the office action relied on Tam as providing such recitation. However, similarly to Marks and Kilner, Tam fails to teach or suggest the features of the magic number recited in the independent claims. Instead, Tam limits its description to providing that a tape or disk that is used to dump a database includes identification information common to any disk-to-tape process. See column 6, lines 27-35. Specifically, such information includes the tape name, the cycle number, the version number, workers, the serial number, compression, and non-compression, the density, and the SCRATCHPOOL option. The information being provided in Tam is not to distinguish any tar and zipped file with the standby database. Rather, the information provided is one that is necessary to a disk-to-tape process. All identifiers used in Tam are to identify the tape or disk used to dump the database, not as a magic number used "to distinguish any tar and zipped file with the standby database," as recited in independent claims 1, 9, and 17. Thus, contrary to the contentions made in the office action, Tam does not cure the deficiencies of Marks and Kilner.

Berstis is also used in an attempt to further cure the deficiencies of Marks, Kilner, and Tam. However, Berstis is limited to generally describing that if the compressed file is not a zip file, a test is provide to determine whether the compressed file is a tar file and that tar files are known compressed files used in UNIX based systems. See column 7, lines 57-67. However, Berstis does

2

not cure the deficiencies of Marks, Kilner, and Tam. The features of independent claims 1, 9, and 17 clearly recite that the magic number is used to **distinguish** any tar and zipped file **with** the standby database. Such recitation is not described or suggested in Berstis.

The combination of Marks, Kilner, Tam, and Berstis would provide backup communications synchronized to primary communications without any manual initialization or re-inputting of any data including a redundant controller system having an active controller with an active database and a standby controller with a standby database and maintaining a cumulative checksum of the entire database, where a tape or disk that is used to dump the standby database would include identification information common to any disk-to-tape process and determining whether a compressed file is a tar file. The combination would be completely devoid of any teaching or suggestion providing a magic number used to "to **distinguish** any tar and zipped file **with** the standby database," as recited in independent claims 1, 9, and 17.

It is clearly erroneous for this rejection to be maintained because Marks, Kilner, Tam, and Berstis fail to teach or suggest all of the elements of independent claims 1, 9, and 17 and the claims that depend from it. Accordingly, Applicants respectfully request that claims 1-7, 9-15, and 17-21 be found allowable and this application be passed to issue.

Clear Error with regard to Motivation, Teaching, or Suggest to Combine

Additionally, the use of four references to make a rejection of the present claims is an indicator that the Office Action is attempting to use an improper piecemeal analysis of various references in order to make this rejection. Specifically, as commonly understood, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art..."[the Examiner] can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references." See In re Fritch, 23 USPQ 2d 1780, 1783 (Fed. Cir. 1992).

It appears that the office action would be using the recitations of the claims of the present application to arrive to the combination of Marks, Kilner, Tam, and Berstis. "One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." See In re Fine, 837 F.2d 1071, 1075, 5 USPQ 2d 1596, 1600 (Fed. Cir.

1988). Accordingly, it is respectfully requested that this rejection be withdrawn.

Clear Error Regarding Interpreting Marks, Kilner, Bapat, and McCloghrie

The office action's interpretation of Marks, Kilner, Bapat, and McCloghrie providing the recitations of claims 8 and 16 as set forth in the office action on pp. 6-7, is clearly erroneous. The detailed explanation of the error of this rejection, provided in the response filed on March 23, 2006, ("the response") at pp. 8-9 is incorporated herein by reference.

Because the combination of Marks, Kilner, Bapat, and McCloghrie must teach, individually or combined, all the recitations of the base claim and any intervening claims of dependent claims 8 and 16, the arguments presented above supporting the patentability of independent claims 1 and 9 over Marks and Kilner are incorporated herein.

Bapat generally describes a Structure of Management Information (SMI) translated to a schema definition which is used to design the formats and templates of data structures within a database, within which actual information content will be stored. See column 7, lines 59-64. In turn, McCloghrie generally describes Internet protocol standards. However, Bapat and McCloghrie do not cure the deficiencies of Marks and Kilner, and, therefore, a combination thereof fails to teach or suggest all the recitations of independent claims 1 and 9. For instance, similarly to Marks and Kilner, Bapat and McCloghrie are devoid of any teaching or suggestion providing "a magic number is kept to distinguish any tar and zipped file with the standby database," as recited in independent claims 1 and 9.

It is clearly erroneous for this rejection to be maintained because Marks, Kilner, Tam, and Berstis fail to teach or suggest all of the elements of independent claims 1, 9, and 17 and the claims that depend from it. Accordingly, Applicants respectfully request that claims 1-21 be found allowable and this application be passed to issue. It is respectfully requested that independent claims 1 and 9 and related dependent claims 8 and 16, respectively, be allowed.

Conclusion

For all of the above noted reasons, it is strongly submitted that certain clear differences exist between the present invention and the prior art relied upon by the Examiner and that a *prima facie* case of obviousness has clearly not been established. This final rejection being in clear error,

therefore, it is respectfully requested that the Examiner's decision be reversed in this case regarding the rejections of claims 1-21 and that this application passed to issue.

Respectfully submitted,

Alicia M. Choi, Attorney for Applicants
Registration No. 46,621

Customer Number 32294
SQUIRE, SANDERS & DEMPSEY LLP
8000 Towers Crescent Drive, 14th Floor
Tysons Corner, VA 22182-2700
Tel: (703) 720-7800/ Fax (703) 720-7802
AMC:jkm

Encl.: Notice of Appeal
Form PTO/SB/33
Check No. 14382